DRN-3790112

The complaint

Ms H's representative has complained, on her behalf, about the advice given to her by Andrew Bourne & Co Independent Financial Advisers Ltd to establish a free standing additional voluntary contribution (FSAVC) policy, saying that the "in house" alternatives offered by her employer weren't discussed.

What happened

Upon the advice of Andrew Bourne & Co, Ms H started contributions to an FSAVC policy in early 1993. At the time, she was 29 and, I understand, employed as a teacher. Ms H's representative has said that she intended to remain in that employment and wished to maximise her pension provision.

Andrew Bourne & Co has been unable to locate documentation relating specifically to Ms H, but in response to the complaint it said that Ms H had complained too late, the matter having been raised with it more than six years after the event complained of (in 2022), and more than three years after she either was, or ought reasonably to have been, aware of cause for complaint (by virtue of likely conversations with colleagues and advertisements about mis-selling).

Ms H's representative referred the matter to this service, where one of our investigators assessed the matter and concluded that the complaint had been raised "in time", saying in summary that it was speculative and hypothetical to assume that Ms H would have had conversations about her pension arrangement with colleagues. Further, he said, Ms H had in fact raised her complaint as a result of seeing an advert about potential mis-selling on social media.

Andrew Bourne & Co responded to say that that the independent financial adviser (IFA) who advised Ms H was fully qualified and in fact an ex teacher who had a good understanding of all the options available at the time. In every case there was a discussion about how the added years scheme worked, but as with many young teachers, Ms H didn't wish to make the commitment of paying a fixed percentage of her likely increasing salary, and preferred the less expensive option of the FSAVC policy.

Ms H would then have been in control of her monthly payments and had the flexibility of stopping at any time. It was also established with one of the leading providers at the time, which had an excellent track record, Andrew Bourne & Co added.

It therefore considered that the plan was suitable for Ms H.

Although there was the option of the "in house" AVC, its adviser's research had demonstrated that the chosen FSAVC policy provider had better long term results. It was possible that the annual management charge in the "in house" AVC was lower, but this could easily have been compensated for by better fund performance over 30 years or longer, Andrew Bourne & Co said.

Andrew Bourne & Co did, however, after further correspondence with the investigator,

accept the latter's view on jurisdiction.

And so the investigator issued his view on the merits of the case, saying that he thought it should be upheld for the following reasons:

- Although he didn't think that Ms H would have starting buying added years due to the associated expense and commitment, he wasn't persuaded that the fund performance of the FSAVC policy would have outweighed the effect of the higher charges compared to the AVC.

- The available evidence didn't support the position that a detailed discussion took place about Ms H's options.

- Under the FIMBRA rules in place at the time, an IFA needed to recommend products which would likely achieve the customer's objectives, and this would have involved consideration of all the options available to Ms H.

The investigator recommended that Andrew Bourne & Co undertake a loss calculation in accordance with the regulator's FSAVC review guidance.

Ms H's representative accepted the investigator's recommendation.

Andrew Bourne & Co responded to say that it didn't think the proposed redress methodology was correct, in that this would reflect fund performance rather than a difference in charges only.

The investigator clarified that the recommended redress proposal was correct, saying that our guidance mirrored that of the regulator in its review of FSAVC policies in 2004.

He further said that, when the charges were applied against the FSAVC policy, they were done by way of a yearly management charges. These charges were placed against the fund and units in which the FSAVC policy was invested. And to ensure a uniform approach, the regulator provided a benchmark which could be used to offset the difference in investment performance between the FSAVC policy and AVCs.

He explained that this service wouldn't expect a business such as Andrew Bourne & Co to compensate a consumer for investment performance, but rather that the charges are based on a comparable benchmark on how the funds were invested.

The investigator further said that, if Ms H had missed out on matched contributions, this would need to be factored into the loss calculation.

Andrew Bourne & Co responded to say that it understood the point relating to the complaint being upheld on the basis of the charges, but it said that it couldn't at that stage accept the investigator's conclusions as it had no information on Ms H's current pension, holdings, historic charges or contributions, or confirmation as to what the AVC charges would have been.

It requested Ms H's authority to be able to gather the required information, and it enquired as to whether this service held any information on the "in house" AVC and the charges which would have been applied, or the AVC scheme charge which it would be expected to use in a comparative calculation.

It also noted that there would have been no matched employer contribution, so this wouldn't be included in the calculation.

The investigator said that he wasn't able to provide information on the "in house" AVC and that it would usually be up to the business to liaise with the consumer regarding redress calculations and then liaise with the necessary pension provider/s. And he further said that it wouldn't be expected that a business would calculate redress until the settlement has been agreed by both parties.

As such, whist the investigator said he understood the reasons as to why Andrew Bourne & Co had requested the information, he didn't think that this would affect the reasons as to why the complaint should be upheld.

But Andrew Bourne & Co remained of the view that it was difficult to understand how the complaint could be upheld if this service didn't have the information in respect of the charges which would have been applicable on the "in house" AVC, compared to those in the FSAVC policy. Both of these would have been dependent upon fund selection, it added.

As agreement couldn't be reached, the investigator confirmed that the matter would be referred to an ombudsman for review.

Andrew Bourne & Co then submitted information relating to the "in house" AVC, which it considered showed that, if Ms H had invested in a unit linked fund, the charges wouldn't have been particularly low cost as, it said, was generalised by this service.

It also then submitted further information relating to the FSAVC policy charges, saying that a calculation of the difference in charges was difficult because the policy stopped and restarted, and then ceased receiving contributions for over 21 years. But it noted that there would have been a "cash injection" on the FSAVC policy, which equated to a refund of some of the charges when a client reached their selected retirement age.

Given the difficulties in establishing the differences between the two types of plan, it maintained that it couldn't see how it could be concluded that the "in house" AVC was better value that the FSAVC policy. It also thought that the "cash injection" meant that it would have been the case that the overall FSAVC policy charges would have been cheaper. But the calculation to determine this would be almost impossible to undertake.

As such, it said it was prepared to offer Ms H £250 for the time and inconvenience in bringing this matter to this service, in full and final settlement of her complaint.

The investigator noted the comments, but said that they didn't persuade him to alter his view on the matter. He did, however, say that he would refer the offer to Ms H.

But Ms H's representative rejected the offer on her behalf. And so, as confirmed by the investigator, the matter's now been referred to me for review.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

And having done so, I've reached broadly the same conclusions as the investigator, and for similar reasons. I think in general terms (but see further below regarding the specific details of this case), the costs associated with "in house" AVCs are likely to be lower than those applicable to FSAVC policies. This formed the basis of past business reviews and, as a general principle, I'm satisfied that this remains the case.

As background to the advice given in 1993, in 1988 FIMBRA said that an adviser should:

- Not make a recommendation unless it believed, having carried out reasonable care in forming its belief, that no transaction in any other such investment (of which it ought reasonably to be aware) would be likely to secure the objectives of the consumer more advantageously, and;

- Take reasonable care to include in any recommendation to a person, other than a professional investor, sufficient information to provide that person with an adequate and reasonable basis for deciding whether to accept the recommendation.

So this means that an IFA should have found out how all of these issues applied to the FSAVC policy and the various "in house" options – typically AVCs and added years - and anything else that might have been relevant to a consumer's situation, such as the sorts of funds within the AVC which may have been available for investment.

The IFA would then have needed to explicitly compare what the "in house" options were and what the FSAVC policy had to offer. So, this meant an IFA should have looked into all of the "in house" options and positively recommending the suitable option. So, they would actively make a recommendation in the best interests of the consumer.

And although I've noted Andrew Bourne & Co's comments that its adviser would always have discussed the options available, Ms H has a different recollection, and I agree with the investigator that the available documentary evidence doesn't support the position that the "in house" options were in fact discussed. And so, on balance, I don't think I can conclude – as I would need to, to be able to determine that Ms H made an informed choice - that it's more likely than not that they were and that the requirements of an IFA at the time were met.

And my view is that, had Ms H been made aware of the "in house" AVC option and it had been recommended to her as the suitable, likely lower cost option, she would have accepted that advice.

But I think the central remaining issue here is Andrew Bourne & Co's view that it can't reasonably be concluded that the costs associated with the FSAVC policy were in fact higher – and on that basis, it doesn't think the complaint should be upheld.

I have carefully noted its comments on that particular point. And there may sometimes be situations where we're satisfied that there might have been shortcomings in the advisory process, but that it hasn't resulted in financial loss. And we can then incorporate that outcome in our conclusions.

But as Andrew Bourne & Co itself says, although it considers it likely that the FSAVC policy charges were in fact lower, in large part due to the refund in charges at the retirement date, it hasn't yet been able to conclusively determine this.

And so, in the absence of persuasive evidence as to whether a consumer has suffered financial loss, we assess complaints on the basis of whether something has gone wrong. If it has, and we uphold the complaint, as I'm satisfied should be the case here on the basis of what's been set out above, we would then direct the business to conduct a loss assessment.

It's then up to the business to determine, by way of that loss calculation, as to whether this has caused the consumer financial loss.

Putting things right

For the reasons given, I'm satisfied that the complaint should be upheld.

My aim is to put Ms H in the position she would have been in, had she opted to begin "in house" AVCs. Andrew Bourne & Co Independent Financial Advisers Ltd should therefore undertake a redress calculation in accordance with the regulator's FSAVC review guidance, incorporating the amendment below to take into account that the data for the CAPS 'mixed with property' index isn't available for periods after 1 January 2005.

As set out above, the FSAVC review guidance wasn't intended to compensate consumers for losses arising solely from poor investment returns in the FSAVC funds, which is why a benchmark index is used to calculate the difference in charges and (if applicable) any loss of employer matching contributions or subsidised benefits.

In our view the FTSE UK Private Investor Growth Total Return Index provides the closest correlation to the CAPS 'mixed with property' index. So, where the calculation requires ongoing charges in an investment-based FSAVC and AVC to be compared after 1 January 2005, Andrew Bourne & Co Independent Financial Advisers Ltd should use the CAPS 'mixed with property' index up to 1 January 2005 and the FTSE UK Private Investor Growth Total Return Index thereafter.

If the calculation demonstrates a loss, the compensation amount should if possible be paid into Ms H' pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Ms H as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid in retirement. 25% of the loss would be tax-free and 75% would have been taxed according to her likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

In closing, I have noted what Andrew Bourne & Co Independent Financial Advisers Ltd has said about the difficulties it's experienced in trying to determine the difference in charges between the "in house" AVC arrangement and the FSAVC policy. I'm sympathetic to this, and also understand that it might have limited resources to undertake such a calculation itself. And so, whilst this service is unable to help with the calculation, it would be open to Andrew Bourne & Co Independent Financial Advisers Ltd to engage the services of an actuarial firm which should be able to assist.

My final decision

My final decision is that I uphold the complaint and direct Andrew Bourne & Co Independent Financial Advisers Ltd to undertake the above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms H to accept or reject my decision before 7 June 2023.

Philip Miller
Ombudsman